

Importance of Consular Access

The U.S. Supreme Court has recognized that violating the consular notification and access requirements of the Vienna Convention on Consular Relations (VCCR) deprives arrested foreigners of "the benefits of consular assistance."¹ When these treaty violations are raised soon enough, trial courts can assist in "vindicating Vienna Convention rights" by "making appropriate accommodations to ensure that the defendant secures, to the extent possible," belated access to consular help.² But what are the benefits of prompt consular assistance, and why are they so important to the U.S. criminal justice process?

Arrested foreign nationals are "strangers in a strange land"

A primary function of the consulates of all nations is to render assistance to any of their nationals who are in distress abroad. Few nationals require consular assistance more urgently than those who are arrested and face prosecution in a foreign country. Arrested foreigners are truly "strangers in a strange land", confronted by an unfamiliar legal system, far from home, and frequently at the mercy of the local authorities. Early consular involvement alleviates the distress and vulnerability of arrested foreigners by providing a trusted source of information that familiarizes detainees with the local legal process while assuring them of a reliable channel of support and contact with the outside world.

Prompt consular access and assistance levels the playing field

The purpose of consular access and assistance is not to provide special benefits to foreigners but simply to ensure that they receive equal treatment. Foreign citizens face unique disadvantages when confronted with prosecution and imprisonment under the legal system of another nation, at all stages of the proceedings. Prompt consular access ensures that arrested foreigners have the means necessary to prepare an adequate defense and to receive the same treatment before the law as domestic citizens. Regular consular communications and visits also ensure that foreign nationals are not subject to discriminatory or abusive treatment while in custody.

Consulates are the 'cultural bridge' between foreign detainees and the legal process

The U.S. government emphasizes to its consular personnel that "one of the basic functions of a consular officer is to provide a 'cultural bridge' between the host community and the officer's own compatriots traveling or residing abroad."³ The State Department has explained to Congress that, after learning of an arrest of a U.S. citizen in Mexico, an American consulate "seeks access to the accused to establish his identity and citizenship, to ensure he is aware of his rights, to advise him of the availability of legal counsel, to give him a list of local attorneys, to help him get in touch with his family and friends, to alert him to the legal and penal procedures of the host country and to observe if he had been or is in danger of being mistreated."⁴ Other countries (notably Mexico) provide comprehensive assistance to their citizens facing prosecution on serious charges in the United States.

Consular assistance provides unique and indispensable protections

While prompt access to consular advice and assistance clearly benefits Americans abroad, it is no less important to foreigners arrested in the United States. As many domestic courts have recognized, consulates can provide essential resources that are simply not available through other means. For example, timely contact with Mexican consular officials "can eliminate false

understandings and prevent actions which may result in prejudice to the defendant” since consular officers can explain the “significant differences between the American and Mexican criminal justice systems.”⁵ In capital cases, Mexican consulates assist defense counsel in locating crucial documents, witnesses and exonerating evidence available only in Mexico—evidence that can mean the difference between conviction and acquittal, or between life and death. Reversing an unjust death sentence imposed on a Mexican national, one of the country’s most conservative appellate courts conceded that it “cannot ignore the significance and importance of the factual evidence discovered with the assistance of the Mexican Consulate” which “would have intervened in the case, assisted with Petitioner’s defense, and provided resources to ensure that he received a fair trial and sentencing hearing.”⁶

Immediate consular access is essential

U.S. consular officers are instructed to “make every effort to gain prompt personal access to an arrested U.S. citizen or national” in order to have “the opportunity to explain the legal and judicial procedures of the host government and the detainee’s rights under that government at a time when such information is most useful.”⁷ Our consulates are therefore instructed to arrange a consular visit “within 24 hours” of notification of an arrest.⁸ The State Department has informed Congress that “immediate consular access is the linchpin. . . . guaranteeing the prisoner against mistreatment and forced statements at the time of arrest, along with making available to him information about responsible legal counsel and judicial procedures.”⁹ However, the essential safeguard of timely consular access is often negated when the arresting authorities fail to inform foreign detainees “without delay” of their right to obtain consular notification and communication, as required under the VCCR.

Consular access enhances the reliability and fairness of the U.S. criminal justice process

Ensuring prompt consular access to foreigners arrested in the United States does far more than protect the reciprocal rights of Americans abroad. By providing foreigners with the means necessary to mount a full defense against serious charges, consular access enhances the truth-seeking function that lies at the heart of American justice. A senior federal judge has pointed out that:

consular notification and access are absolutely essential to the fair administration of our criminal justice system. Just as a lawyer guides a criminal defendant through the unknown territory of the justice system, diplomatic officials are often the only familiar face for detained nationals, and the best stewards to help them through the ordeal of criminal prosecution. . . . Without these aids, I think that we presume too much to think that an alien can present his defense with even a minimum of effectiveness. The result is injury not only to the individual alien, but also to the equity and efficacy of our criminal justice system.¹⁰

¹ *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 350 (2006).

² *Id.*

³ U.S. Department of State, *Foreign Affairs Manual* (1984) Ch. 400, Introduction.

⁴ U.S. Citizens Imprisoned in Mexico: Hearings before the Subcommittee on International, Political and Military Affairs, Part I, 94th Cong. 16 (1975) (Statement of Leonard F. Walentynowicz).

⁵ *Ledezma v. State*, 626 NW.2d 134, 152 (Iowa 2001).

⁶ *Valdez v. State*, 46 P.3d 703, 210 (Okla. Crim. App. 2002).

⁷ U.S. Department of State, *Foreign Affairs Manual* (2004), § 7 Consular Affairs, 7 FAM 422 Access, at (f).

⁸ *Id.* 7 FAM 422.1-2 Telephone Contact.

⁹ U.S. Citizens Imprisoned in Mexico: Hearings before the Subcommittee on International, Political and Military Affairs, Part II, 94th Cong. 6 (1975) (Statement of Leonard F. Walentynowicz).

¹⁰ *U.S. v. Li*, 206 F.3d 56, 78 (1st Cir. 2000) (Torruella, C.J., concurring in part and dissenting in part).

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Time to comply with the Vienna Convention

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Lori F. Damrosch

June 27, 2011

U.S. citizens travel, study and work abroad in vast numbers. Every year, thousands of them are detained and sometimes jailed, not always under circumstances comporting with U.S. views of due process. The bulwark of their protection is the Vienna Convention on Consular Relations, which binds the United States and 172 other countries to notify nationals of treaty partners who are arrested or detained of their right to contact the consulate of their country.

The Vienna Convention has been the supreme law of the land since 1969, when it was unanimously approved by the Senate and brought into force by President Richard Nixon. The Senate gave advice and consent on the basis that the treaty would be self-executing — that is, that no implementing legislation would be needed.

This premise turned out to be incorrect. In *Medellin v. Texas* (2008), the U.S. Supreme Court held that an international judgment based on the Vienna Convention could not be given effect as directly applicable federal law. Rather, Congress would have to adopt the necessary legislation to enable the United States to comply with its treaty obligations.

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It is now urgent for Congress to enact such legislation. Since 2004, when Mexico obtained a ruling from the International Court of Justice (ICJ) on remedies for U.S. treaty violations affecting 51 Mexican nationals on death row in U.S. states (*Avena and Other Mexican Nationals*), the United States has been under a binding obligation to afford a judicial remedy to those individuals.

One of them, Humberto Leal, is scheduled to be executed by the state of Texas on July 7. As in *Medellin*, Texas maintains that despite the binding force of the ICJ judgment in international law, Texas is not required to implement it unless Congress enacts legislation so providing. Until Congress acts, the United States remains in continuing default of its international legal obligations; and if it does not act before Leal's execution date, the damage will be irreparable.

The United States has a long history of successfully resolving disputes over consular rights through international arbitration and adjudication. In 1927, a U.S.-Mexican claims commission held that "a foreigner, not familiar with the laws of the country where he temporarily resides, should be given opportunity" for consular access. The Vienna Convention codifies this international practice.

Under Article 36 of the Vienna Convention, a foreign national who is arrested or detained for any reason whatsoever must be notified "without delay" of his right to communicate with the consular post of his country. The 51 Mexican nationals covered by the *Avena* judgment were not given any such notice and thus Mexico was unable to give them consular services in their trials on capital charges.

Between 1969 and 2005, the United States consented to an optional protocol to the Vienna Convention under which disputes with other treaty partners could be brought to the ICJ for binding decision. In 1979, the United States invoked this procedure against Iran in the Tehran hostages case and received unanimous favorable decisions from the ICJ in 1979 and 1980, which helped the United States muster support from other states toward resolution of the hostage crisis in January 1981.

Mexico availed itself of this same consent-based procedure in asking the ICJ to determine the remedy for repeated U.S. breaches of the Vienna Convention. The United States did not contest that Texas and several other states had placed the United States in violation of binding obligations to Mexico by failing to notify the 51 death row inmates of their right to contact the Mexican consulate. The ICJ ruled that the remedy for the treaty violations would be judicial hearings to review whether there had been prejudice affecting each national's conviction or sentence from the lack of consular notice.

The case of Leal is illustrative of the need for consular services when foreign nationals are on trial for serious charges. Leal was born in Mexico and moved to a poverty-stricken area of San Antonio, where his family struggled in unfamiliar circumstances. He suffered from brain damage, learning disabilities and abusive treatment, including sexual abuse by a priest. Although he had to repeat several school grades, he became the first member of his family to graduate

from high school and never had a criminal conviction before being arrested for murder.

Without resources, Leal received grossly inadequate representation during his pretrial, trial, sentencing and appellate proceedings. One of his trial attorneys has twice been suspended from law practice. Counsel failed to challenge unreliable forensic evidence at trial or to introduce mitigating evidence at the penalty phase. The Mexican government regularly offers consular services in death penalty cases that could have changed the result and averted the death sentence.

On June 14, Senator Patrick Leahy (D-Vt.) introduced legislation that would ensure U.S. compliance with international obligations pursuant to Article 36 of the Vienna Convention on Consular Relations. The "Consular Notification Compliance Act" provides for federal court review in cases of foreign nationals convicted and sentenced to death prior to its enactment, specifically on the question of whether the denial of prompt and ongoing consular access resulted in prejudice in those cases. The legislation also increases opportunities to ensure early compliance with all consular notification in future capital cases involving foreign nationals. Congress must move quickly to pass this legislation. In the meantime, Leal's execution should be stayed to avoid the irreparable damage that will result if he is executed before the treaty-based judicial hearing that the United States is obliged to provide.

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The Washington Post

Consular access: A two-way street on a crucial right

By Euna Lee, Published: June 24

In 2009, while on assignment for Current TV, my colleague Laura Ling and I were arrested by North Korean soldiers for crossing the frozen Tumen River, which separates the Republic of China and North Korea. We were imprisoned and isolated from one another for 4 1/2 months. We were repeatedly interrogated, eventually put on trial and sentenced to 12 years' hard labor. It was only through the extraordinary efforts of the State Department and former president Bill Clinton that we were pardoned and allowed to return home.

It is difficult to describe the fear that comes with being arrested and detained in a foreign country. The sense of darkness in that first week of North Korean captivity was unbearable. My biggest fear was nobody knowing where I was or what had happened to me. The strained relations between the United States and North Korea only increased my despair.

In the middle of the second week, though, I was handed a lifeline: a meeting with the Swedish ambassador, who represented U.S. interests and pointed out to North Korea its responsibilities under the Vienna Convention on Consular Relations. His hard work yielded a meeting no longer than 10 minutes, but the significance is hard to express. I can only mention the sense of security I now had — that someone outside of North Korea was monitoring my case. The prompt consular access, I believe, protected me from any physical mistreatment by my captors. I was allowed to meet with the ambassador three more times. The meetings were my only communication with the U.S. government — the only way for me to ask for help and to deliver messages to my family. I know the importance of what the Vienna Convention provides.

Legislation has been introduced in Congress to ensure judicial review of death penalty cases involving foreign nationals who were not given consular access under the Vienna Convention. This legislation is not only a matter of honoring our obligations to such inmates. There are still many American journalists, aid workers, missionaries, members of the military and tourists detained in foreign countries. For all of them, and for their fearful families at home, there is nothing more important than upholding the reciprocal right to consular protection. With this legislation, Congress can protect that right.

The United States failed to abide by the Vienna Convention in the case of Humberto Leal Jr., a Mexican national who is scheduled to be executed in Texas on July 7. While I am not questioning the verdict of the jury that convicted him of murder, our obligations under the Vienna Convention are clear in all cases, including Leal's. Indeed, the International Court of

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Justice (ICJ), the judicial arm of the United Nations, held that foreign nationals such as Leal have a right to a hearing to determine if they were harmed by not being told of their consular rights. Former president George W. Bush, all nine U.S. Supreme Court justices and the Obama administration agree that the United States is obligated to comply with the ICJ's decision.

Then why doesn't it? The United States has always been in the forefront of the fight for human rights. People look to us to be a watchdog for human rights violations around the globe. We ask the world to treat our citizens with respect when they are detained in other countries, including honoring their right to consular access. It is a two-way street. The United States must lead by example in honoring consular treaty obligations and in providing a remedy when that right is violated. If Congress does not act swiftly, other countries will be encouraged to violate the consular rights of U.S. citizens traveling abroad. I know firsthand that this is a risk we cannot take.

Euna Lee is a journalist and the author of "The World is Bigger Now: An American Journalist's Release from Captivity in North Korea."

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